92-765

No. 92-571

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PAINEWEBBER INCORPORATED,
Petitioner

v.

BANKATLANTIC,
Respondent

Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should exercise its power of supervision to review this extreme case of intentionally orchestrated attorney and juror misconduct which resulted in a grossly unfair trial in a federal district court and which was allowed to stand, at least in part, because of a failure to apply the express provisions of Rule 606(b), Federal Rules of Evidence.

PARTIES TO THE PROCEEDING

Cross-petitioner and respondent is BankAtlantic Savings Bank, a Federal Savings Bank, f/k/a Atlantic Federal Savings and Loan Association ("BankAtlantic").

Cross-respondent and petitioner is PaineWebber, Incorporated, f/k/a Blyth Eastman Paine Webber Incorporated ("PaineWebber").

DESIGNATION OF CORPORATE RELATIONSHIPS

Respondent's parent corporation is BFC Financial Corporation, f/k/a BankAtlantic Financial Corporation, f/k/a I.R.E. Financial Corporation. The entities affiliated with the parent are:

2000 South Dixie Corp.
B. & N. General Corp.
B.K. General Corporation
B.K.S. General Corporation
B.W. General Corporation
Chicago Heights General Corp.
Eden Services, Inc.
Eden United, Inc.
First Pensacola Mortgage Company, Inc.
Florida Partners Corporation
H.D. General Corporation
H.K. General Corporation
I.R.E. Advisors, Corp.
I.R.E. Advisors Series 21, Corp
I.R.E. Advisors Series 23, Corp.
I.R.E. Advisors Series 24, Corp.
I.R.E. Advisors Series 25, Corp.
I.R.E. Advisors Series 26, Corp.
I.R.E. Advisors Series 27, Corp.
I.R.E. Advisors Series 28, Corp.
I.R.E. Advisors Series 29, Corp.
I.R.E. BMOC, Inc.
I.R.E. Commercial Properties, Inc.
I.R.E. Computer Resources, Inc.

I.R.E. Condominium Management, Inc.
I.R.E. Energy 1981, Inc.
I.R.E. First Florida, Inc.
I.R.E. Growth Fund, Ltd.—Series 29
I.R.E. Income Advisors Corp.
I.R.E. Investments, Inc.
I.R.E. Konica, Inc.
I.R.E. Leasing, Inc.
I.R.E. Lennar, Inc.
I.R.E. North River, Inc.
I.R.E. Pension Advisors Corp.
I.R.E. Pension Advisors—II Corp.
I.R.E. Pension Investors, Ltd.
I.R.E. Pension Investors, Ltd.—II
I.R.E. Pinebrook, Inc.
I.R.E. Professional, Inc.
I.R.E. Properties, Inc
I.R.E. Property Analysts, Inc.
I.R.E. Property Management, Inc.
I.R.E. Real Estate Corporation (THE)
I.R.E. Real Estate Fund, Ltd.—Series 21
I.R.E. Real Estate Fund, Ltd.—Series 23
I.R.E. Real Estate Fund, Ltd.—Series 24
I.R.E. Real Estate Fund, Ltd.—Series 25
I.R.E. Real Estate Fund, Ltd.—Series 26
I.R.E. Real Estate Fund, Ltd.—Series 27
I.R.E. Real Estate Funds, Inc.
I.R.E. Real Estate Growth Fund, Ltd.—Series 28
I.R.E. Real Estate Income Fund, Ltd.
I.R.E. Real Estate Investment, Series 2, Inc.
I.R.E. Real Estate Investments, Inc.
I.R.E. Realty Advisory Group, Inc.
I.R.E. Shopping Center Development
I.R.E. Texas, Inc.
I.R.E. Wren Park, Inc.
Investors Sheltered Securities, Inc.
N.C. & G. General Corporation
North Miami General Corp.

Pengro Associates, Inc.
Professional Data Corporation
Realty 2000 Corporation
Rushmore Realty, Inc.
S & P General Corp.
S.T. General Corporation
Saxon S.L. General Corporation
Saxon S.W. General Corporation
Southern National General Corporation
Tanglewood College Station, Inc.
Tigertail General Corporation
Toy Associates, Inc.
Toy General Corporation
Travis House Apartments, Inc.
U.S. Capital Corp.
U.S. Capital Securities, Inc.
W.P. General Corporation
Z.W. General Corp.

Entities affiliated with the respondent are:

Atlantic Investment 68 Avenue Corp.
Atlantic Investment Broward Boulevard Corporation
Atlantic Investment Clifton Corp.
Atlantic Investment Commercial, Inc.
Atlantic Investment Cypress Lane Corp.
Atlantic Investment Jacaranda Corp.
Atlantic Investment Pelican Point Corp.
Atlantic Investment Pines Point Corporation
Atlantic Investment Taft Street Corp.
BankAtlantic Development Corporation
BankAtlantic Leasing
Fidelity Service Corporation
Hammock Homes, Incorporated
Heartwood 1, Inc.
Heartwood 2, Inc.
Heartwood 3, Inc.
Heartwood 4, Inc.
Heartwood 5, Inc.
Heartwood 6, Inc.

Heartwood 7, Inc.
Heartwood 8, Inc.
Heartwood 9, Inc.
Heartwood 10, Inc.
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Heartwood 12, Inc.
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Heartwood 15, Inc.
Heartwood 16, Inc.
Heartwood 17, Inc.
Heartwood 18, Inc.
Heartwood 19, Inc.
Heartwood 20, Inc.
Heartwood 87 Incorporated
Heartwood 88 Incorporated
Heartwood 90 Incorporated
Heartwood 91 Incorporated
Heartwood 91-1 Incorporated
Heartwood 91-2 Incorporated
Heartwood 91-3 Incorporated
Heartwood 91-4 Incorporated
Heartwood-Promenade Incorporated
Professional Valuation Services, Inc.

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CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-petitioner BankAtlantic requests that a writ of certiorari be granted to review the decision of the United States Court of Appeals for the Eleventh Circuit dated March 23, 1992, affirming a district court judgment based upon a jury verdict in favor of PaineWebber. A-3, App. E.* This cross-petition presents an extreme case of intentionally orchestrated attorney and juror misconduct calling for an exercise of this Court's power of supervision.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 955 F.2d 1467 (11th Cir. 1992) and is included in Paine-

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* References to "A-—" are to the Petitioner, Paine Webber's, appendix. References to "App. ——" are to Cross-Petitioner, BankAtlantic's, appendices.

Webber's appendix at A-3. The Eleventh Circuit's denial of rehearing on July 2, 1992, is included in PaineWebber's appendix at A-1.

The most relevant decisions of the district court are: (1) Memorandum order of July 10, 1989, on sanctions against PaineWebber and its counsel (App. A); (2) Memorandum order filed October 27, 1989, on admissibility at trial of personal financial information of BankAtlantic's chairman (App. B); (3) Final Judgment filed November 24, 1989 (App. E); (4) Omnibus order dated January 19, 1990, denying rehearing A-35-39); (5) Order filed March 8, 1990, setting an evidentiary hearing regarding juror misconduct (App. D); and (6) Order filed August 14, 1992, denying BankAtlantic's Motion for New Trial and Supplemental Motion for New Trial (App. C).

JURISDICTION

The decision of the Eleventh Circuit for which BankAtlantic seeks review was entered on March 23, 1992. A-3. Rehearing was denied on July 2, 1992. A-1. BankAtlantic relies upon Rule 12.3 of this Court for filing of its cross-petition.[1] BankAtlantic received PaineWebber's

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[1] BankAtlantic understands that its cross-petition will not be granted unless PaineWebber's petition is granted. Rule 13.5. Considering that PaineWebber's petition is frivolous, it appears unlikely that the cross-petition will be granted. Nonetheless, BankAtlantic recognizes that this Court has broad discretion when deciding which writs to accept and that it may even grant a petition for the purpose of affirming a specific decision of a circuit court.

Although BankAtlantic initially made a decision not to petition this Court, knowing that it is preoccupied with a wide range of highly charged social issues, BankAtlantic strongly believes that a gross miscarriage of justice occurred in this case. Both the district court and the Eleventh Circuit applied erroneous legal standards and demonstrated little concern about the egregious and intentionally orchestrated attorney and juror misconduct that deprived BankAtlantic of a fair trial in this case. It would be fitting if this Court relied on PaineWebber's own petition to accept jurisdiction and correct the wrong by ordering a new trial and reminding the lower federal courts that they must be vigilant to prevent misconduct such as PaineWebber's.

petition for writ of certiorari on October 2, 1992. This Court has jurisdiction to review the decision of the Eleventh Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Rule 606, Federal Rules of Evidence provides:

> **(b) Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

STATEMENT OF THE CASE

BankAtlantic sued PaineWebber for breach of fiduciary duty, fraud, and related tort claims.[2] A-85. The essence of those claims was that PaineWebber abused a fiduciary relationship with BankAtlantic by making a series of misrepresentations and omissions to induce BankAtlantic into two complex, financial transactions involving interest rate swaps. The PaineWebber employees who recommended the swaps had lied about their expertise on placing swaps in situations such as that encountered by BankAtlantic (admitting at trial that they had none) and had lied about the supposed benefits of the transactions.

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[2] There was also a distinct claim for breach of contract. That claim was discussed at length in BankAtlantic's Brief in Opposition to PaineWebber's petition.

In fact, the transactions made no sense for BankAtlantic looking at its business as a whole. In the end, the complicated transactions accomplished nothing more than causing BankAtlantic to wire transfer over a period of years of a total of $24 million in cash to another, and far more lucrative, client of PaineWebber: Homestead Savings of California. To assure that BankAtlantic would make those payments, the PaineWebber employees had concealed most of the information they had about their extensive and highly profitable relationship with Homestead, about the problems at Homestead, and about the huge risks of the transactions.

So significant was the relationship between PaineWebber and Homestead that during the discovery phase of this litigation, PaineWebber and its attorneys had intentionally defied discovery rules and had violated a district court discovery order by continuing to conceal from BankAtlantic information about Homestead. As the district judge stated in his lengthy "Memorandum Order" outlining the violations: "In short, [PaineWebber] did its utmost to keep [BankAtlantic] in the dark, and the truth hidden." *BankAtlantic v. Blyth Eastman Paine Webber, Inc.*, 127 F.R.D. 224, 233 (S.D. Fla. 1989). App. A.

Despite the sanction, PaineWebber did not change its behavior. PaineWebber approached the trial with exactly the same attitude it had during discovery, that is, with an intent to employ any necessary tactic to avoid paying BankAtlantic for the staggering damages (more than $30 million including interest) it had caused.

PaineWebber knew that the operative facts had been established in pretrial discovery, including post-sanction expedited discovery, and knew that those operative facts were essentially undisputed. The people at PaineWebber who sold BankAtlantic on these transactions made statements that were clearly false and had purposefully omitted to disclose facts which would have prevented the transaction from occurring. No one from PaineWebber

who participated in structuring the transactions could defend at trial what they had done. Their "expertise" was nonexistent and their breach of fiduciary duty obvious.

The passage of time had demonstrated that the very risks known to PaineWebber and concealed from BankAtlantic were both real and had occurred. The motive for PaineWebber's actions had become clear. BankAtlantic's losses were both measurable and large. The BankAtlantic officers who had been duped by PaineWebber had all left the institution. Some of PaineWebber's own employees had moved on and were not so constrained by "loyalty" to an employer.

The question for PaineWebber had become: What could it do at trial to win? The answer, we now know, was to launch an intense, vicious, and false personal attack on the new chairman of BankAtlantic, Alan Levan. The strategy was to obscure the complex financial transactions at issue in this case with an avalanche of largely irrelevant "facts" and to focus the attention of the jurors on a highly personal attack of the kind one might expect to find in the *National Inquirer*.

Although the district court's rulings would not permit an examination of the matter, it is believed that PaineWebber conducted a pretrial background investigation of the prospective jury pool, the names of which are provided to counsel in advance of trial upon request, to determine, among other things, if a personal attack might be effective. Among the first of the names on that list was Anthony Lippert, who, BankAtlantic later discovered, worked as a real estate salesman for a law school classmate of one of PaineWebber's trial counsel.

During voir dire, Lippert was asked his occupation. He responded: "Recently retired from AT&T." R44 at 35. Lippert completely failed to disclose that he was presently employed as a real estate salesman. When asked if he had any bad experiences he thought might affect his abil-

ity to be fair, Lippert volunteered: "I don't think it would affect my fairnes but I did have or my wife had an experience with one of the marginal stockbrokering companies that trade in penny stocks and they had a smooth talking salesman who persuaded her to make an investment and it turned out to be bad." *Id.* at 38. Despite this statement, Lippert still concealed that he was a salesman and, of course, his statement indicated a potential bias in favor of BankAtlantic.

Lippert was not struck from the jury panel. (BankAtlantic did strike another person from panel who admitted to being a real estate saleswoman.) Lippert was sworn in as a juror in this case. Indeed, Lippert ultimately became the jury foreman. The stage was set.

I. ATTORNEY MISCONDUCT: THE ATTACK ON BANKATLANTIC'S CHAIRMAN

Alan Levan knew very little about this case from his direct knowledge. He could only offer indirect hearsay or conclusory testimony. The swap transactions were initiated in 1984. Levan did not become chairman of BankAtlantic until 1987.[3]

Levan had no direct dealings with PaineWebber at any time. He took no part in the discussions involving the second swap (not being on the Executive Committee where all such discussions took place) and was not even a member of the board when the first swap was executed. Levan had no direct or indirect involvement with the

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[3] In late 1983, I.R.E. Financial Corporation, in which Levan had a controlling interest, became a ten percent shareholder of BankAtlantic. In April 1984, Levan was elected as a member of BankAtlantic's board. In February 1987, the Federal Home Loan Bank Board authorized I.R.E. to acquire a controlling interest in BankAtlantic. That same month, I.R.E. acquired the stock and Levan became chairman of BankAtlantic's board. By the time of trial in 1989, I.R.E. owned approximately 65% of BankAtlantic's common stock.

swaps or management of the swaps. R.63. That responsibility fell to others.

Nonetheless, PaineWebber featured Alan Levan at trial to make him synonymous with BankAtlantic in the minds of the jurors and then to vilify him. PaineWebber's attack was designed so that the jury would ask itself: "How can we possibly give that man $30 million?"

One major prong of the atack was to parade Levan's income before the jury. Like other senior executives of large companies, Levan is well compensated. His total income from all sources was $755,081 in 1986, $764,193 in 1987, $502,717 in 1988, and $919,921 in 1989, the year of the trial. R63 at 173-92. None of Levan's salary, however, came from BankAtlantic until after I.R.E. had been approved to acquire a controlling interest in the institution. No income was received by Levan from BankAtlantic until almost two years after the damage from the swaps had reached the maximum level, and almost four years after the swaps were placed. The portion of Levan's salary paid by BankAtlantic after 1987 did not exceed $260,000. *Id.*

To put evidence of Levan's income before the jury, PaineWebber called Levan as a witness in *its* case. For hours, Levan was questioned regarding a document prepared by BankAtlantic and its counsel in the latter part of 1983, before Levan had any interest in the institution. R63. Levan was then interrogated on other documents he had little or no role in preparing and on a host of other extraneous matters. *Id.* None of this interrogation involved Levan's knowledge of facts. R63.

After this meaningless, but lengthy, interrogation, PaineWebber asked Levan about his compensation. The district court overruled BankAtlantic's vehement objections to this line of questioning. The court later refused to allow BankAtlantic to bring before the jury all of the factors that bore on Levan's income, such as the fact that

he and his wife had been kidnapped in 1988 and held for ransom to be paid by BankAtlantic.

The prejudicial effect of the income information is obvious. The overwhelming public outcry when there is any effort to raise the salaries of public officials to even a fraction of the levels enjoyed in the private sector is well known to all.[4] Moreover, the salary levels of corporate executives, especially those in the savings and loan industry, had become very unpopular as financial institutions failed and the economy deteriorated.

PaineWebber's distorted use of the income testimony in closing argument was even more prejudicial. Counsel for PaineWebber placed his comments about Levan's income in the context of the board's removal of the former president and then asserted: "From there on . . . Mr. Levan starts getting $1 million a year." R66-129.

Not only was this and other similar assertions inflammatory and prejudicial, it was completely false and totally irrelevant to the proceedings. Levan was never paid more than $260,000 from BankAtlantic, he had no personal knowledge of the facts of the case, and he was called to the stand by PaineWebber solely to elicit his income and to vilify him. The prejudice to BankAtlantic was made all the more striking because the judge sustained PaineWebber's refusal to divulge the income of its employees who were involved with the swaps.

In another prong of its personal attack on Levan, counsel for PaineWebber repeatedly referred to Levan as a "corporate raider." In closing, counsel for PaineWebber told the jury: "Corporate raider. What we know is they

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[4] One of the many ironies in this case was that shortly after the case was finally resolved in the district court, the trial judge resigned from the bench because of the level of pay of a federal judge and wrote for *The Miami Herald* a lengthy article discussing the failure of the public to establish appropriate levels of compensation for judicial officers.

go into a company. They take control. They take over. They sell off the assets like those 14 percent mortgages, pull the income out and leave the carcass."[5] R66-127. BankAtlantic's objection to this outrageous argument in closing was met with the district court's ruling: "Overruled: jury question." *Id.* So the argument was both permitted and underscored by the court.

The argument of PaineWebber's counsel was completely unfounded in fact. Mr. Levan had never before taken control of a company. He had, over a period of 20 years, steadily built from scratch his I.R.E. family of companies, which counsel for PaineWebber told the jury in a derogatory manner was a "spider web" with all the money leading to Levan's pocket. R63-213-216, R66-129. In fact, it was the lead company of that group of public and private companies, I.R.E. Financial (traded on the American Stock Exchange) that acquired control of BankAtlantic, not Levan personally. Moreover, the 14% mortgage assets were not sold off to leave a "carcass," as stated by counsel for PaineWebber. Although a few were sold, almost all of them were prepaid by the homeowners who refinanced when interest rates dropped. R55-56-76.

Another prong of the attack was to expressly include Levan in the company of David Paul, who was widely regarded in both South Florida and the nation as the most notorious looter of a savings and loan association (CenTrust) after Charles Keating. Three times in rapid succession, counsel for PaineWebber asked Levan during the trial if he knew that BankAtlantic had hired PaineWebber in 1984 "to keep people like you and David Paul . . . and other corporate raiders out." R63-194. The same phrase, "to keep people like you" out, was repeated each

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[5] In opening, counsel for PaineWebber had told the jury about take-overs: "We have all heard or read about takeovers in the last 10 years. A take-over is where a group of business types try to buy the stock of a target company, fire the old management, install new management and in time sell off the assets." R44-204.

time. Each time, Levan answered that he did not have knowledge of what the managers of BankAtlantic thought in 1984 when he was not even there. *Id.* But counsel for PaineWebber was unconcerned with the answers; he was playing to the passions of the jury about wealthy savings and loan executives.

Yet another prong of the personal attack was to build on the notion of Levan as a raider-thief. Counsel for PaineWebber told the jury that BankAtlantic "cooked the books" to hide the losses from the swaps so that a $3 million dividend could be paid to Levan. R66-120-21. PaineWebber's counsel characterized the testimony of Mr. Sarrica, BankAtlantic's current chief investment officer, as " 'Ah, listen, you know what? There were losses. We didn't report them.' Wink wink. 'We cooked the books. Sure, those losses aren't reflected in the financial statements and sure they are not reflected over here. We cooked the books.' " *Id.* Counsel for PaineWebber called such actions "a Federal crime" and he also characterized Mr. Sarrica as testifying: "We didn't report any losses because if we had reported a loss that would have wiped out 30 percent of the capital and then we couldn't pay dividends." *Id.*

In reality, Mr. Sirrica did not so testify or even come close to inferring such testimony. R55-4-128. Moreover, even though a dividend of $3 million was paid, it went to BankAtlantic's holding company (about $2 million) and to the other BankAtlantic shareholders (about $1 million), not to Levan personally. R63-167-218. In addition, and perhaps most significantly, after the dividend was paid, the holding company had put more than $6 million back *into* BankAtlantic. *Id.* Levan and his companies were not raiding or stripping the carcass of BankAtlantic. To the contrary, they were adding money to build up its capital, capital that was depleted in good measure by PaineWebber's breaches of fiduciary duty.

To tie to the present case the villainous description of Levan as a greedy, corporate raider stripping bare the carcass of BankAtlantic, counsel for PaineWebber offered the jury two false explanations of motive. One was revenge. In opening, counsel for PaineWebber told the jury: "BankAtlantic is not suing PaineWebber here because its employees didn't do their job." R44-204. The reason, he said, was PaineWebber's earlier effort to keep him from taking over BankAtlantic. *Id.* At closing, counsel for PaineWebber told the jury that "what this is all about" is "a vendetta, a revenge." R66-127-29. He told the jury PaineWebber was sued because it dared to get in the way of Alan Levan and try to prevent him from taking over BankAtlantic so he could "pull the income out and leave the carcass." *Id.*

The other motive counsel for PaineWebber suggested to the jury as a reason for this suit was pure greed. In opening, counsel told the jury: "we will show you that BankAtlantic takes their profits to the bank and their losses to court." R44-219. At closing, counsel reminded the jury: "As I told you, this [case] is nothing more than $100 with a Complaint. 'Let's ask for $100 million.' Throw the mud up on the wall and see what sticks." [6] *Id.*

II. JUROR MISCONDUCT: BRINGING EXTRANEOUS AND PREJUDICIAL INFORMATION ABOUT BANKATLANTIC'S CHAIRMAN TO THE DELIBERATIONS

Unknown to BankAtlantic at the time, PaineWebber's closing arguments were carefully addressed to a very tainted jury. On the same day as closing arguments, jury deliberations, and the verdict itself (all of which occurred Monday, November 13, 1989), Anthony Lippert

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[6] PaineWebber has a curious tendency to accuse others of the very wrongdoing in which it is engaging.

(the jury foreman) read a prejudicial *Miami Review*[7] newspaper article containing extraneous information about Alan Levan and BankAtlantic. Mr. Lippert had obtained that article from his employer, the one he concealed during voir dire and the one who was a law school classmate of counsel for PaineWebber.

The article read by Mr. Lippert was a front page story dated November 13, 1989, which featured a large picture of Alan Levan and which was entitled "A Big Week For BankAtlantic." R39-736-Exhibit B. It focused on a number of themes used later in the day by counsel for PaineWebber to attack Levan.

One of the most apparent of those themes was a disparaging view of Levan's income. Both under his picture on the front page and in the text of the article was a recitation of the precise amount of Levan's earnings: "Levan made $259,585 from BankAtlantic last year [1989], and an additional $660,336 from BankAtlantic Financial [the holding company], for a total of $919,921. Levan owns 39.6 percent of BankAtlantic Financial's stock." *Id.* The article, however, put this discussion about income in the context of BankAtlantic's poor earnings for the past year, which the article quoted Levan as calling "short-term earnings concessions" necessary to expand the scope of its banking services to include all those offered by commercial banks. *Id.* The article sarcastically summed up this situation by saying: "BankAtlantic's earnings 'concessions' to the commercial bank strategy didn't include salary concessions."[8] *Id.*

No doubt Mr. Lippert and any other juror who saw the article related that discussion in the article to the jury argument of counsel for PaineWebber that Alan Levan is a corporate raider who "pull[s] the income out

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[7] The *Miami Review* is affiliated with *The American Lawyer*.

[8] It should be noted that despite the staggering losses caused by PaineWebber, BankAtlantic is a profitable institution which meets or exceeds all capital requirements.

and leave[s] the carcass." R66-127. The article clearly provided extrinsic information to support the arguments of counsel for PaineWebber.

In a large headline on the second page of the *Miami Review* article was the statement: "BankAtlantic lays troubles at feet of critical shareholder." R39-736-Exhibit B. In the text, the article discussed at length pending litigation with that shareholder, Elliot Borkson. The article described the litigation as "pitting BankAtlantic against a minority shareholder" and as blaming "the shareholder for damaging the thrift's image and depressing its stock price." *Id.* In the course of its discussion, the *Miami Review* article quoted several financial experts as stating "that they don't buy BankAtlantic's effort to blame Borkson for its poor image and low stock price. The stock price is to be expected for a company with BankAtlantic's earnings results, they said, and the thrift still must prove it can make money in its basic operations." *Id.*

This additional extrinsic evidence obviously played directly into what counsel for PaineWebber argued to the jury, including the assertion that "we will show you that BankAtlantic takes their profits to the bank and their losses to court." The entire discussion in the article about, and even the existence of, the Borkston litigation, however, is something to which the jurors should not have been exposed. It was totally extraneous information of a very prejudicial nature. In fact, it was expressly excluded from evidence at trial. R39-736-3, 12; R(5776)3-743A-2. Not only was the jury foreman exposed, however, but the discussion (and extraneous evidence) tied into the highly prejudicial arguments made by counsel for PaineWebber, giving it great credence to the jury.

Not surprisingly in retrospect, the jury returned a verdict in favor of PaineWebber on the very same day that Lippert read the article of which PaineWebber's counsel made such extensive use during closing. A-40. It was as if the article had been devised to support and

supplement PaineWebber's scurrilous diversionary attack on Levan.

III. DISTRICT COURT EXAMINATION OF THE JURORS

BankAtlantic did not learn about this situation until the *Miami Review* published yet another article on February 5, 1990, entitled "Jury foreman ignored judge's order, read article." R39-736-2 and Exhibit A. As noted in the February 5 article, the trial judge, knowing about the November 13 article, had on the morning of November 13 expressly reiterated his early order that the jurors must not read any articles about the case. The judge had even polled the jurors to determine if they had seen the November 13 article or any other articles. R66-23-24. Following the lead of Anthony Lippert, each juror in turn had denied seeing anything. *Id.* Lippert's own admissions contained in the February 5 article thus established that he had been untruthful with the judge and had violated an express court order.

Based upon the facts reported in this second article, BankAtlantic filed a motion for new trial because of the juror misconduct. R39-736. The district judge set an evidentiary hearing to examine the jurors, but he stated that such examination would be conducted solely by himself. App. D at 39a.

The district judge also stated in his order setting the evidentiary hearing to examine the jurors that:

> The hearing will be limited to the objective evidence, *i.e.*, "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." FRE 606(b). The jurors will not be permitted to testify as to whether the extraneous materials affected their decision. *See Perkins*, 748 F.2d at 1534 n.15.

Id.

After desultory questioning by the district court judge, some additional facts did emerge. For example, despite

an express order not to read articles about the case, the substance of the November 13 *Miami Review* article was not only read by the jury foreman, it was also discussed among the other jurors just prior to closing arguments and, most likely, during deliberations that same day. R(5776)4-766B-1-5. In particular, the jurors admitted they knew it "was about Levan." *Id.* And as a result of the article, the jurors learned for the first time about the existence and substance of the Borkson litigation, evidence of which had been expressly excluded from the trial due to its prejudicial and irrelevant nature. *Id.*

From the judge's questioning, it was also learned that Lippert was employed as a real estate salesman and that he obtained the article from his employer. *Id.* The judge failed to pursue that information, however, and it was only through further investigation by BankAtlantic that the link with counsel for PaineWebber was discovered.[9] R766A, R766B. Moreover, the district judge failed to pursue in his questioning the contemptuous behavior of Lippert toward the court on November 13.

Instead, and contrary to his earlier order setting the evidentiary hearing, the district judge inquired of Lippert whether the article had an effect on his verdict. Lippert, not surprisingly, answered that it did not.[10]

The district court relied upon Lippert's answer when denying BankAtlantic's motion for new trial just shortly before departing the bench for private practice in Miami. He stated in the order:

> The Court acknowledges that juror Lippert's testimony that the extrinsic information was harmless is

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[9] Without access to discovery tools, which the trial judge did not allow, compulsory development of additional, formal proof by BankAtlantic on this matter was not possible.

[10] This is the same juror who talked with counsel for PaineWebber shortly after delivering the verdict in this case and then seconds later told a reporter (as quoted by PaineWebber on page 21 of its petition to this Court) that the action was "frivolous" and that he was "sorry to see the case in court."

> not controlling. *United States v. Bolinger*, 837 F.2d 436, 440 (11th Cir. 1988). However, since it may be considered as a factor in evaluating a claim of juror exposure to prejudicial extrinsic evidence, *id.*, the Court has included this aspect of juror Lippert's testimony in its assessment of Plaintiff's claim.

App. C at 33a and n.1.

It would be a tragic miscarriage if the district court judge's imminent departure from the bench and his return to the ranks of Miami lawyers caused him to lose enthusiasm for pursuing the wrongdoing by Lippert and counsel for PaineWebber. What should have been pursued vigorously by the trial judge was essentially dropped.

IV. REVIEW BY THE ELEVENTH CIRCUIT

In an opinion written by a senior member of the same district court as the trial judge in this case, the Eleventh Circuit took the same lackluster approach as the district court to the obvious prejudice caused BankAtlantic by the orchestrated attorney and juror misconduct. It is clear that the Eleventh Circuit simply looked for any statements by the district court or PaineWebber in the record—however inaccurate or misleading—to hold that the district court had not abused its "large discretion." [11] A-14-22.

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[11] On the substantive issues of the case, for example, the Eleventh Circuit relied for affirmance upon the assertion of PaineWebber that "BankAtlantic was aware of the risks associated with the interest rate swaps, such as rate fluctuations and prepayment of mortgages." A-13. That statement is both false and misleading.

The transactions involved in this case were very complicated, and the risks, most of which were not understood by BankAtlantic at the time, were also quite complex. The interest rate swap agreements were, as structured by PaineWebber, merely part of a larger "dynamic hedge" against adjustable rate mortgages designed to extend over a period of seven years. Not only honesty but also highly specialized expertise (both of which PaineWebber falsely represented that it had) is required to determine if such transactions are appropriate for any particular institution and, if so, to properly effectuate them. The same honesty and expertise is then required to manage the situation over the life of the swaps. As even PaineWebber's own expert stated, this is "tricky" business.

For example, the Eleventh Circuit followed the lead of the district court in accepting, as both credible and cognizable, Lippert's testimony at the evidentiary hearing that the November 13 *Miami Review* article had no effect on his partiality. A-17. This ignores the express provisions of Rule 606(b), Federal Rules of Evidence, prohibiting such testimony.

The Eleventh Circuit also accepted the district court's conclusion that only one jurror "had any knowledge about the contents of the newspaper article" despite testimony to the contrary by jurors at the evidentiary hearing. A-16, App. C at 32a. Similarly, both courts totally ignored the fact that Lippert was not just "a" juror but, rather, the jury foreman who had an apparent influence over the other jurors. *Id.* And both courts attempted to minimize the impact of the clearly prejudicial extraneous information contained in the November 13 article by completely ignoring the highly significant fact that it was read by the jury foreman just before closing argument and deliberations in violation of a court order.

Overall, the Eleventh Circuit failed to recognize the significance of the combined attorney and juror misconduct. The combination is so unusual that BankAtlantic has been unable to find any reported decision in which such a confluence of events as occurred in this case—especially where attorney misconduct blended so prefectly with juror misconduct—was considered. By mechanically analyzing juror misconduct in one discreet section of its opinion and attorney misconduct in another, the Eleventh Circuit lost sight of the whole picture.

Through the combined effect of attorney and juror misconduct, BankAtlantic was clearly prejudiced and the case was clearly not decided through the calm and dispassionate consideration of an untainted jury. The trial was fundamentally unfair, and neither the district court nor the Eleventh Circuit acted decisively to correct the injustice.

REASONS FOR ALLOWING THE WRIT

This is an extreme case of intentionally orchestrated attorney and juror misconduct. That misconduct caused a grossly unfair trial in a federal district court. BankAtlantic did not have a fair and impartial jury consider its case, and there was more than a reasonable possibility of prejudice to BankAtlantic as a result of the misconduct. A clear miscarriage of justice occurred.

On at least two occasions, this Court, in the exercise of its supervisory powers, has reversed jury verdicts based upon the introduction at trial of extraneous, prejudicial information through newspaper accounts read by jurors. *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959); *Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892); *cf. Murphy v. Florida*, 421 U.S. 794, 804, 95 S.Ct. 2031, 2038, 44 L.Ed. 2d 589 (1975) (in which Chief Justice Burger noted in a concurring opinion that he "would not hesitate to reverse petitioner's conviction in the exercise of our supervisory powers, were this a federal case").

In this case, there exists far more than just the introduction of extraneous, prejudicial information to the jury during trial. There was also, unknown to BankAtlantic at the time, a conscious and scurrilous use of that extraneous information by counsel for PaineWebber in the presentation of PaineWebber's case to a jury tainted by a foreman who had, by his acts of concealment and violation of court order, already demonstrated actual bias and lack of impartiality.

Moreover, both the district court and the Eleventh Circuit expressly decided to let the jury verdict stand based, at least in part, on the testimony of the jury foreman in a post-verdict, evidentiary hearing that the extraneous information did not influence him. A-17; App. C at 33a. Such reliance is directly contrary to the express provisions of Rule 606(b), which prohibits testimony as "to the effect of anything upon that or any other juror's

mind or emotions as influencing the juror to assent or to dissent from the verdict."

The provisions of Rule 606(b) on this point have long been the rule in this Court as clearly demonstrated by the opinion in *Mattox, supra*. In the *Mattox* case, this Court held that in ruling on a motion for new trial, the trial court should have considered post-verdict affidavits of jurors regarding their reading of a newspaper article and hearing comments of a bailiff during the course of a trial. Of great significance to this Court in so holding was that the jurors' affidavits contained no discussion of the influence the extraneous information had upon them:

> It will be perceived that the jurors did not state what influence, if any, the communication of the bailiff and the reading of the newspaper had upon them, but confined their statements to what was said by the one and read from the other.

13 S.Ct. at 52. *See also* the Court's discussion of authorities on this point at 13 S.Ct. 53. *See generally, Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987) (review of legislative history of Rule 606 establishes that this Court's views prevailed in language ultimately adopted).

This case is not the first case in which the Eleventh Circuit has completely overlooked the express provisions of Rule 606(b). In *United States v. Bolinger*, 837 F.2d 436, 440 (11th Cir. 1988), the Eleventh Circuit expressly stated that a district court may consider testimony of a juror that extrinsic information was harmless. Nowhere in the opinion did the court even mention, let alone consider, the prohibition on such testimony contained in Rule 606(b).

More generally, this case, as compared to other cases in which new trials were granted as a result of attorney misconduct, juror misconduct, or the injection of extraneous information, is an extreme one. *See, e.g., United States v. Perkins*, 748 F.2d 1519 (11th Cir. 1984); *Koufakis v. Carvel*, 425 F.2d 892 (2d Cir. 1970).

No doubt, however, other cases like the present one will arise in the future. In the past several decades since this Court's decision in *Marshall*, lawyers have become much more skilled and subtle in their means of influencing broadcast and print media, not only to promote themselves but also to influence the outcome of cases they handle. Lawyers have also become much more attentive to, and skilled in, the analysis and selection of jurors. When large sums of money or other high stakes are involved, the temptation to apply those skills improperly to influence or assure the outcome of a jury decision is great. Unfortunately, the federal district and circuit courts do not appear to have kept pace with such advances in "technology."

CONCLUSION

Therefore, to correct the present miscarriage of justice, to instruct the Eleventh and other circuit courts on the application of Rule 606(b), and to remind all federal courts of the need for vigilance to prevent both juror and attorney misconduct, this Court should grant BankAtlantic's cross-petition.

Respectfully submitted,

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